

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHRISTOPHER S. MCCUSH

Claimant

VS.

CITY OF MANHATTAN

Self-Insured Respondent

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Docket No. 1,041,159

ORDER

Claimant appeals the June 24, 2009, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was awarded benefits for a 15 percent permanent impairment to the left index finger based on the medical opinion of board certified internal medicine and occupational medicine specialist Chris D. Fevurly, M.D.

Claimant appeared by his attorney, Bruce Alan Brumley of Topeka, Kansas. Respondent appeared by its attorney, Kip A. Kubin of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on October 6, 2009.

ISSUES

1. What is the nature and extent of claimant's impairment? Claimant argues that the functional impairment to his left hand should be based on a 15 percent impairment of the hand pursuant to the opinion of board certified independent medical examiner Daniel D. Zimmerman, M.D. Dr. Zimmerman's rating involved a 54 percent impairment to the left index finger and a 20 percent impairment to the left middle finger. Respondent argues that the zero impairment opinion of claimant's treating physician, board certified plastic surgeon Kenneth A. Fischer, M.D., is the most credible.
2. Did the ALJ err in refusing to grant claimant's "Motion to Strike for the record The Testimony of Kenneth Fischer, M.D.", in light of the

doctor's conduct at his deposition? Claimant argues that the deposition of Dr. Fischer should be stricken from the record as the doctor and claimant's attorney were involved in a confrontation during the doctor's cross-examination resulting in the doctor demanding that claimant's attorney leave his office, and also resulting in claimant's attorney not having the opportunity to complete the cross-examination of the doctor.

3. Claimant argues his constitutional right to due process in the cross-examination of the witness was compromised as the result of his not being able to complete the cross-examination of Dr. Fischer. The ALJ decided to allow the testimony of Dr. Fischer, but found his testimony should carry little, if any, weight. The final award was based on the medical opinion of Dr. Fevurly.

FINDINGS OF FACT

Claimant was working for respondent in its public works department running a jackhammer on June 3, 2008, when the jackhammer slipped and claimant's left hand was crushed against a rock wall. The accident resulted in injuries to claimant's left index and left middle fingers. Claimant was referred to Dr. Fischer on the date of accident and underwent surgery on his left index finger resulting in the insertion of a K-wire to repair a fracture in that finger. Claimant's long finger was dressed after the doctor determined that it had not been fractured. The fracture of the index finger was at the tip of the finger, an injury commonly known as a tuft fracture. Claimant progressed well, with a very good outcome from the treatment. Claimant was released from Dr. Fischer's care on November 4, 2008, with a full range of motion in the fingers and normal two point discrimination. Dr. Fischer opined that claimant would have no permanent disability from this accident. During the deposition of Dr. Fischer, a confrontation occurred between the doctor and claimant's attorney resulting in heated words between the two. Dr. Fischer then refused to answer any further questions, and claimant's attorney was asked to leave the doctor's office. The cross-examination of the doctor was abruptly terminated.

Claimant was referred by his attorney to Dr. Zimmerman for an evaluation on November 25, 2008. Dr. Zimmerman diagnosed claimant with crush injuries to both the index and middle fingers on his left hand. Dr. Zimmerman testified that the fact that claimant had soft tissue trauma to both digits constitutes a crush injury to the finger. Dr. Zimmerman determined that claimant had suffered tuft fractures of both fingers. Dr. Zimmerman rated claimant's injuries pursuant to the fourth edition of the *AMA Guides*¹

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

at 30 percent to the index finger for sensory deficit, 15 percent for PIP range of motion limitations, 13 percent for DIP range of motion deficit and 9 percent for MP range of motion deficit. All combined, claimant had suffered a 54 percent functional impairment of the index finger. Dr. Zimmerman also rated claimant's middle finger at 9 percent for MP range of motion limitations and 12 percent for PIP range of motion limitations. All combined, this results in a 20 percent impairment of the finger. The two finger ratings, when combined, result in a 15 percent impairment of the left hand. On cross-examination, Dr. Zimmerman acknowledged that the 54 percent rating to the index finger was equal to the rating that would be given if claimant suffered an amputation of the index finger at the DIP joint.

Claimant was referred by respondent's insurance company to Dr. Fevurly on January 19, 2009. Dr. Fevurly examined both the middle and index fingers on claimant's left hand. The middle finger had a full range of motion, and Dr. Fevurly recorded no complaints from claimant for this finger. The index finger range of motion limitations resulted in a 10 percent impairment of the finger and, due to sensory loss, the finger also had a 5 percent limitation. All combined, claimant suffered a 15 percent impairment of the left index finger from the accident on June 3, 2008.

Claimant filed a "Motion to Strike for the Record The Testimony of Kenneth Fischer, M.D." on May 27, 2009. The Order by the ALJ denying the Motion to Strike was filed June 5, 2009. The ALJ ruled that the reasons set forth to strike the deposition went to the weight and credibility of the testimony and not to the admissibility. The Award of the ALJ was then issued on June 24, 2009. Claimant took no additional action during the period between the denial of the Motion and the issuance of the Award.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

² K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁵

Claimant appeals the determination by the ALJ that the accident to claimant resulted in a permanent injury to claimant's index finger only. Claimant bases his appeal on the medical opinions of Dr. Zimmerman that claimant suffered permanent injury to both the index and middle fingers of claimant's left hand. Dr. Zimmerman found permanent impairment to both fingers, a finding contradicted by both Dr. Fischer and Dr. Fevurly. Dr. Zimmerman also found significant range of motion limitations in both fingers. Again, he was the only health care provider to find such extensive limitations. Finally, Dr. Zimmerman's rating to the index finger, at 54 percent of the finger, was equal to a total amputation at the DIP joint. This rating appears excessive with a finger suffering only a tuft fracture at the tip of the finger.

The ALJ found the rating of Dr. Fevurly to be the most persuasive. Claimant argues that Dr. Fischer's opinions and deposition should be stricken from the record due to the dispute between the doctor and claimant's attorney. The ALJ refused to so exclude. But, the ALJ did determine that the opinion of Dr. Fischer merited little weight. Apparently, the ALJ also determined that the inflated ratings of Dr. Zimmerman also merited little weight. The ALJ then went on to adopt the medical opinion of Dr. Fevurly and awarded claimant a 15 percent permanent partial impairment of function to the index finger only.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁶

⁴ K.S.A. 2007 Supp. 44-501(a).

⁵ K.S.A. 44-510e(a).

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Board, after reviewing the record, agrees with the determination of the ALJ. Claimant is awarded a 15 percent permanent partial functional impairment of the index finger.

Claimant objects to the inclusion of the testimony and reports of Dr. Fischer, due to the controversy generated at Dr. Fischer's deposition. Claimant seems to infer that his constitutional right to due process was denied due to the doctor's combative attitude during the deposition. While due process does require a party have the right to cross-examine a witness during litigation, in this instance, the dispute between the attorney and the doctor resulted in no harm to claimant. The ALJ apparently gave little or no weight to the medical opinion of Dr. Fischer that claimant suffered no permanent impairment from the accident of June 3, 2008.

When claimant's cross-examination of Dr. Fischer was interrupted, claimant filed his Motion to Strike, which was denied by the ALJ. At that point, an appropriate remedy would have been to request the ALJ to order the doctor to appear before the ALJ in order for the attorney to conclude the cross-examination. An administrative law judge has the power to issue subpoenas and compel the attendance of witnesses similar to a district court judge.⁷ However, claimant made no such request and the cross-examination of the doctor remained unfinished. Had claimant elected to pursue this administrative remedy, not only would the cross-examination of the doctor have been completed before the ALJ, but also an apparently contentious doctor would have been educated in the proper etiquette during depositions.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has suffered a 15 percent permanent partial functional disability to his left index finger from the injuries suffered on June 3, 2008. The deposition testimony and medical reports of Dr. Fischer remain as part of this record, but have been given little weight in this decision.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

⁷ K.S.A. 2008 Supp. 44-551(i)(1); see also *Sebelius v. LaFaver*, 269 Kan. 918, 9 P.3d 1260 (2000).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated June 24, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

Claimant's Motion to Strike the deposition testimony of Dr. Fischer should be granted. We disagree with the ALJ that "[t]he concerns [c]laimant expressed about Dr. Fischer's testimony goes to credibility and not admissibility." Due process requires that claimant's counsel be given the opportunity to complete his cross-examination of respondent's expert witness. We also disagree with the majority that it was claimant's burden to subpoena Dr. Fischer to appear before the ALJ in order to complete his cross-examination. Dr. Fischer was respondent's witness. If respondent wanted Dr. Fischer's deposition testimony admitted into the record, then it was respondent's

burden to make its witness available for claimant to complete his cross-examination.⁸ Furthermore, without Dr. Fischer's deposition testimony, his report is inadmissible.⁹

BOARD MEMBER

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent
Rebecca A. Sanders, Administrative Law Judge

⁸ K.S.A. 60-227.

⁹ K.S.A. 44-519.